BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into the Integrity of Southern Bell's Repair Service Activities and Reports	))))	920260-TL Docket No. 910163-TL Filed June 22, 1993

LIMITED APPEARANCE OF SOUTHERN BELL EMPLOYEE ANNIE BUSH, WITH RESPONSE AND OPPOSITION TO PUBLIC COUNSEL'S PREMATURE MOTION TO COMPEL

COMES NOW, Mrs. Annie Bush, a craft employee of Southern Bell, by and through her undersigned attorney, and for the purpose of responding to Public Counsel's "Motion to Compel" only, hereby appears before the Commission and states and requests as follows:

1. That Mrs. Annie Bush is a mere craft employee of Southern Bell. She began working at Southern Bell in 1964 as a Telephone Operator, and is presently working as a Administrative Repair Clerk. Mrs. Bush is not now, nor has she ever been, a director, officer, or manager of Southern Bell.

2. That Mrs. Bush is not a party to the litigation and administrative proceedings presently being conducted between the Office of Public Counsel and Southern Bell.

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3. That Mrs. Bush was never served with a subpoena requiring her to appear and answer questions at any deposition being conducted by the Office of Public Counsel as part of the above captioned proceedings. She was asked by her employer to appear at the depositions being conducted in Orlando by Public Counsel during the week of June 7, 1993[1]. Based on this request by her employer, Mrs. Bush appeared at a *mutually* convenient time.

[1]Mrs. Bush was one of numerous witnesses Public Counsel met with during this week, most of whom answered Public Counsel's questions without incident.

Upon the advice of her attorney, the undersigned, she refused to answer substantive questions posed by the Public Counsel.

4. That since Mrs. Bush is not a party to these proceedings, Public Counsel must first have her properly served with a subpoena to take her deposition, and if she refuses, only then can Public Counsel seek an order to compel. *See, Fla. R. Civ. P.* 1.310 and 1.410(d)[2]; *compare, Anderson Investments Co. LTD v. Lynch,* 540 So.2d 832, 833 (Fla. 4th DCA 1988)(Person who is not a party to pending litigation must be served with subpoena before being required to answer questions in deposition); *West Stuart Acreage, Inc. v. Hannett,* 427 So.2d 323 (Fla. 4th DCA 1983) (Neither officers, directors, shareholders, ***or employees*** of corporation are parties to action against corporation).[3]

THEREFORE, Mrs. Annie Bush, by and through her undersigned counsel, respectfully requests that Mrs. Bush be allowed to appear before the Commission for the sole purpose for responding to Public Counsel's Motion to Compel, and further requests, based on the arguments and authorities set out above, that Public Counsel's Motion to Compel be DENIED.

Respectfully submitted this 29th day of June of 1993.

H. MANUEL HERNANDEZ
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[2]Commission Rule 25-22.034 provides that the Florida Rules of Civil Procedure apply to discovery matters in litigation before the Commission.

[3]Copies of *Anderson Investment Co. LTD* and *West Stuart Acreage, Inc.* have been appended to this motion for the convenience of the Commission.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June of 1993, a copy of the foregoing has been mailed to the following parties:

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H. Manuel Hernandez

that the poor visibility conditions were less apparent or known to appellants than they were to appellees. On the contrary, the complaint alleges that "great quantities of dark smoke" combined with fog to "completely cover the adjacent section of the highway with a thick dark cloud of fog and smoke." The complaint further alleges that this hazardous condition "was not readily apparent to the plaintiff," but the allegations show the condition was an obvious one, *Payne v. Broward County*, 461 So.2d 63 (Fla.1984), and appellant's knowledge was actual, whereas appellees' knowledge, as alleged, is implied. There are no allegations that the condition constituted a hidden danger or trap, *Bailey Drainage District v. Stark*, 526 So.2d 678, 681 (Fla. 1988).

Accordingly, the judgment below is affirmed.

THOMPSON and WIGGINTON, JJ., concur.

INTERNATIONAL BANKERS INS., Appellant,

v.

Susan ARNONE, Appellee.

Nos. 87–00623, 87–00999 and 87–01446.

District Court of Appeal of Florida, Fourth District.

Dec. 12, 1988.

Prior report: 528 So.2d 917.

BY ORDER OF THE COURT:

ORDERED that the Appellant's August 31, 1988, Motion for Rehearing/Certification is hereby denied. Further,

ORDERED that the Appellant's August 31, 1988, Motion to Stay the Mandate is denied without prejudice to refile the motion upon filing of petition in the Supreme Court.

ANDERSON INVESTMENTS COMPANY LTD., d/b/a Park City West and Bill Anderson, Petitioners,

v.

The Honorable Thomas M. LYNCH, Circuit Judge, 17th Judicial Circuit of Florida, Respondent.

No. 88–2205.

District Court of Appeal of Florida, Fourth District.

Dec. 14, 1988.

Petition for writ of prohibition was filed seeking to restrain trial judge from proceeding further on contempt sanctions based on nonparty witness' failure to appear for deposition. The District Court of Appeal held that trial court exceeded its jurisdiction in finding contempt because, although nonparty partnership had been served with subpoena, nonparty witness had not, and contempt sanction was available against nonparty witness only when he failed to be sworn or to answer question after being directed to do so by court.

Anstead, J., dissented and filed opinion.

1. Prohibition ⇐19

Although trial judge was only proper respondent to petition for writ of prohibition, appellate court considered response on merits filed by actual parties whose discovery request gave rise to action by trial judge for which writ was sought.

2. Prohibition ⇐10(2)

Prohibition was appropriate remedy to prevent contempt proceeding where trial

court apparently exceeded its jurisdiction in finding contempt in first place.

3. Pretrial Procedure ⇐129

Person who is not party to pending lawsuit must be served with subpoena before being required to appear for deposition.

4. Pretrial Procedure ⇐129

Trial judge exceeded his jurisdiction in finding nonparty witness in contempt for failing to respond to notice for deposition where no subpoena was ever issued or served on nonparty but only on nonparty partnership; contempt was available remedy only if nonparty witness failed to be sworn or to answer question deposition after being directed to do so by court. West's F.S.A. RCP Rules 1.310(b)(6), 1.380(b), 1.410(e).

5. Pretrial Procedure ⇐121, 124

Partnership may be noticed for deposition by designation of matters on which examination is requested, and partnership then has right to designate one or more persons to testify on its behalf. West's F.S.A. RCP Rule 1.380(b).

Joel Miller of Miller, Squire & Rafferty, Chartered, Fort Lauderdale, for petitioners.

Jerome L. Hall, Fort Lauderdale, for respondent.

PER CURIAM.

This court sua sponte amended the style of the case to reflect Judge Lynch as the proper respondent and ordered petitioners to file a reply as to why the defendants, the Youngs, were also named as parties to the petition. No response was filed by Judge Lynch within the twenty days provided and petitioners moved for issuance of a writ. That prompted our order, directing the defendants in the underlying action, the Youngs, to file a response on the merits of the petition, which we have now received.

[1] While the only proper respondent to the petition for writ of prohibition is the judge, we are considering the response on the merits filed by the actual parties to the underlying litigation, the Youngs. We grant the petition for writ of prohibition which seeks to restrain the trial judge from taking future actions which exceed his jurisdiction, and delete from the style hereof the defendants in the trial court. We do not issue the writ, in the belief that there will be voluntary compliance herewith.

[2] Prohibition does lie as an appropriate remedy, in that petitioners seek to prevent a contempt proceeding where the trial court appears to have exceeded its jurisdiction in finding contempt in the first place. *See Allman v. Johnson*, 488 So.2d 884 (Fla. 5th DCA 1986); *State ex rel. Gillham v. Phillips*, 193 So.2d 26 (Fla. 2d DCA 1966).

[3, 4] Petitioners have shown that the circuit court in this case is without jurisdiction to proceed further on the contempt sanctions it entered, and that the order of contempt itself should be quashed. They point out that the witness, Bill Anderson, who was noticed for deposition, was never served with a witness subpoena; and they correctly note that a person who is not a party to a pending lawsuit must be served with a subpoena before being required to appear for deposition. *Ward v. Gibson*, 340 So.2d 481 (Fla.3d DCA 1976).

[5] A partnership may be noticed for deposition by a designation of matters on which the examination is requested. According to Florida Rule of Civil Procedure 1.310(b)(6), the organization named then has the right to designate one or more of its officers or persons to testify on its behalf. This is not the only permissible course, and respondents/the Youngs did not proceed in that manner. Instead, they simply noticed for deposition Bill Anderson, who was not a party to the pending lawsuit. The petitioning partnership was.

Florida Rule of Civil Procedure 1.410(e) provides that a person who fails to obey a subpoena without an adequate excuse may be deemed to be in contempt of court. However, in this case no subpoena was ever issued or served on Bill Anderson. Furthermore, the only sanctions which appear to be available for failure to appear by Bill Anderson are set forth in rule 1.380 of

the Florida Rules of Civil Procedure. These rules provide for a motion for an order compelling discovery and for other alternatives. Subsection (b) of this rule provides that contempt of court may be found if a deponent fails to be sworn or to answer a question *after being directed to do so by the court.* There was no prior court order directing Bill Anderson to appear for deposition.

GLICKSTEIN and GUNTHER, JJ., concur.

ANSTEAD, J., dissents with opinion.

ANSTEAD, Judge, dissenting.

I do not believe the petitioners have made a sufficient showing or provided a sufficient record to demonstrate the lack of jurisdiction of the trial court to enter the order in question.

STATE of Florida, DEPARTMENT OF TRANSPORTATION, Appellant,

v.

M.C.C. OF FLORIDA, INC., etc., et al., Appellees.

Nos. 87-1893 to 87-1895.

District Court of Appeal of Florida, First District.

Dec. 14, 1988.

Department of Transportation appealed from judgment of the Circuit Court, Leon County, William L. Gary, J., entered in favor of subcontractor, supplier and carrier in action arising from alleged breach of construction contract. The District Court of Appeal, Wentworth, J., held that: (1) statute requiring Department of Transportation to pay contractor interest at rate of six percent on unpaid balance if Department does not pay contractor within 90 days of receipt of required documents did not apply, and (2) Department was required to pay prejudgment interest at statutory rate in effect at time interest accrued.

Affirmed in part, reversed in part, and remanded.

1. Interest ⇐31

Statute requiring Department of Transportation to pay contractor interest at rate of six percent on unpaid balance if Department does not pay contractor within 90 days of receipt of required documents did not apply to action in which subcontractor claimed damages for work performed and Department disputed cost claims. West's F.S.A. § 337.141.

2. Interest ⇐31, 39(2.30)

States ⇐171

Department of Transportation was required to pay prejudgment interest after it was held liable on construction contract at statutory rate in effect at time interest accrued; accordingly, interest should have been assessed at rate of six percent up to date of amendment of statutory interest rate, and rate of 12% after date of amendment. West's F.S.A. § 687.01.

Gregory G. Costas, Appellate Atty., Thomas H. Bateman, III, General Counsel, Dept. of Transp., for appellant.

Jeanne T. Tate, of Shackleford, Farrior, Stallings & Evans, Tampa, for appellee Futch.

Robert L. Donald and Michael F. Kayusa, of Pavese, Garner, Haverfield, Dalton, Harrison & Jensen, Lehigh Acres, for appellee Coral Rock Industries, Inc.

Thomas L. Powell, of Douglass, Cooper, Coppins & Powell, Tallahassee, for appellee Baycon Industries, Inc.

WENTWORTH, Judge.

The appellant Florida Department of Transportation seeks review of partial final summary judgments, final judgments rendered pursuant to jury verdicts, and orders

WEST STUART ACREAGE, INC., a Florida corporation, Appellant,

v.

John L. HANNETT and Jon H. Berkey, Individually and as Co-Trustees, Robert A. Rinehart, jointly and severally, Appellees.

No. 82-2232.

District Court of Appeal of Florida, Fourth District.

Feb. 23, 1983.

Foreclosure action was brought against corporation and its president in his individual capacity, but process was served only on corporation. The Circuit Court, Martin County, Rupert Jasen Smith, J., issued order requiring corporation president to present himself for taking of deposition, and corporation appealed. Treating appeal of nonfinal order as petition for writ of certiorari, the District Court of Appeal, Hersey, J., held that, as president in his individual capacity had never been served either as separate party or as witness, trial court erred in requiring him to present himself for taking of his deposition within 15 days upon penalty of default judgment.

Petition denied and appeal dismissed.

1. Corporations ⇐506

Neither officers, directors, shareholders, or employees of corporation are parties to action against corporation.

2. Pretrial Procedure ⇐101

When corporation is sued, it is corporation, not court or opposing party, who decides what agents shall appear and speak for corporation in litigation.

3. Pretrial Procedure ⇐126

In suit against corporation, discovery may be had of particular officer, director, shareholder, or employee of corporation by service of process upon individual as with any other witness.

4. Pretrial Procedure ⇐101

Where process in foreclosure action was served on corporation, but not on its president in his individual capacity either as separate party or witness, trial court erred in ordering president to present himself for taking of his deposition within 15 days on penalty of default judgment.

Russell J. Ferraro of McManus, Stewart & Ferraro, P.A., Stuart, for appellant.

Wesley R. Harvin of Law Offices of Wesley R. Harvin, P.A., Palm City, for appellees.

HERSEY, Judge.

In this foreclosure action against appellant corporation and against its president in his individual capacity, process was served on the corporation but not on the individual defendant.

Appealed is an order requiring the individual defendant to present himself for the taking of his deposition within fifteen days. The consequences of failure to appear are that the pleadings filed by the corporate defendant will be stricken and a default judgment entered against it.

[1-4] The order is plainly wrong. Neither the officers, directors, shareholders or employees of a corporation are parties to an action against the corporation. It is the corporation, not the court or the opposing party, who decides what agents shall appear and speak for the corporation in litigation. To be sure discovery may be had of a particular officer, director, shareholder or employee of a corporation by service of process upon the individual like any other witness. *Ohio Realty Investment Co. v. Lawyers Title Insurance Corp.*, 244 So.2d 176 (Fla. 4th DCA 1971). Here the individual has never been served with process, either as a separate party or as a witness.

The difficulty is that the order appealed is not one of those non-final orders from which appeal is permitted under the Florida Rules of Appellate Procedure. We therefore treat the matter as a petition for writ of certiorari. Because any harm in the

form of default may be adequately redressed on plenary appeal, we deny the petition.

PETITION DENIED; APPEAL DISMISSED.

DELL and WALDEN, JJ., concur.

HEATH AND COMPANY, Appellant,

v.

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, Unemployment Appeals Commission, and Joanne L. Brook, Appellees.

No. 82-1711.

District Court of Appeal of Florida, Second District.

Feb. 23, 1983.

Appeal from Florida Unemployment Appeals Commission.

John W. Robinson, IV, of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, for appellant.

James R. Parks and Larry D. Scott, Tallahassee, for appellee, Unemployment Appeals Commission.

No appearance for appellee Joanne L. Brook.

PER CURIAM.

There being competent substantial evidence supporting the referee's findings as well as the later affirmance by the Unemployment Appeals Commission, we affirm. *See C.F. Chemicals, Inc. v. State Department of Labor*, 400 So.2d 846 (Fla. 2d DCA 1981); *State Department of Commerce v. Dietz*, 349 So.2d 1226 (Fla. 2d DCA 1977).

BOARDMAN, A.C.J., and CAMPBELL and LEHAN, JJ., concur.

R.K.K., a child, Appellant,

v.

STATE of Florida, Appellee.

No. 82-1246.

District Court of Appeal of Florida, Second District.

Feb. 25, 1983.

Appeal from Circuit Court, Pinellas County; Jack A. Page, Judge.

Jerry Hill, Public Defender, Bartow, and Allyn Giambalvo, Asst. Public Defender, Clearwater, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and William I. Munsey, Jr., Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

After reviewing the briefs and record on appeal, we find the appellant has failed to demonstrate any reversible error; therefore, the order of adjudication is affirmed. However, that portion of the court's order assessing appellant court costs in the amount of $150 is stricken because appellant was found insolvent by the trial court. *Cox v. State*, 334 So.2d 568 (Fla.1976); *Brown v. State*, 427 So.2d 271 (Fla. 2d DCA 1983).

HOBSON, A.C.J., and SCHEB and LEHAN, JJ., concur.